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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-16

UNITED STATES OF AMERICA,
Appellant,

v.

STATE OF GEORGIA, DEPARTMENT OF TRANSPORTATION,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM OR TO SPECIALLY SET ARGUMENT

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INDEX

	Page
TABLE OF AUTHORITIES	ii
MOTION TO AFFIRM OR TO SPECIALLY SET ARGUMENT	1
STATEMENT OF THE CASE.	2
ARGUMENT	5
A. THE DECISION OF THE LOWER COURT WAS CORRECT UNDER THE PRIOR DECISIONS OF THIS COURT	5
B. THE CASE OF NATIONAL LEAGUE OF CITIES V. USERY MAKES IT CLEAR THAT IT IS DIRECTNESS OF INTERFERENCE WITH GOVERNMENTAL FUNCTIONS THAT DETERMINES THE VALIDITY OF A FEDERAL TAX UPON STATE ACTIVITIES.	9
C. THE ARGUMENT THAT THE TAX IS CONSTITUTIONAL BECAUSE IT HAS BEEN CHARACTERIZED AS A "USER FEE" IS TOTALLY WITHOUT MERIT . .	13
CONCLUSION	14
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

Cases: Page

Congress of Industrial Organizations v. McAdory, 325 U.S. 472, 477 (1945) 4

Educational Film Corp. v. Ward, 282 U.S. 379 (1931) 13

Indian Motorcycle Co. v. United States, 283 U.S. 570 (1931) 6, 8, 12

Massachusetts v. United States, 548 F.2d 33 (1st Cir. 1977) 4

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 5, 6

Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U.S. 249 (1933) 13, 14

National League of Cities v. Usery, 426 U.S. 833 (1976) . . 8, 9, 10, 11, 12, 13

New York v. United States, 326 U.S. 572 (1946) 7, 8, 10, 12

Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952) 4

Page

Socialist Labor Party v. Rhodes, ___ U.S. ___, 21 L. Ed. 2d 74, 89 S. Ct. 4 (1968) 2

Statutes:

26 U.S.C. § 4491 . . . . . 2, 4

28 U.S.C. § 1252 3

29 U.S.C. §§ 201, et seq. 9

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77-16

UNITED STATES OF AMERICA,

Appellant,

v.

STATE OF GEORGIA, DEPARTMENT
OF TRANSPORTATION,

Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF GEORGIA

MOTION TO AFFIRM OR TO SPECIALLY SET ARGUMENT

Appellee the State of Georgia, Department of Transportation, moves the Court to affirm the judgment of the court below on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

In the alternative, should the Court deem full briefing and argument necessary,

Appellee requests the Court to note probable jurisdiction and moves the Court to set the case for oral argument in tandem with the argument of the case of Commonwealth of Massachusetts v. United States, October Term 1976, No. 76-1500, on the ground that both cases involve the same question and represent a split in the circuits on the question.[1]

STATEMENT OF THE CASE

This case arises out of an action brought by the State of Georgia to obtain a refund of taxes paid pursuant to section 4491 of the Internal Revenue Code of 1954, 26 U.S.C. § 4491, imposing a tax on the use of civil aircraft.

The aircraft with regard to which the taxes were paid were owned exclusively by the State of Georgia and were used exclusively by state agencies in the fulfillment of their duties and functions, all of which were traditional, governmental activities.[2]

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[1] See Supreme Court Rules, R. 43, ¶¶ 4 & 5; Socialist Labor Party v. Rhodes, ___ U.S. ___, 21 L. Ed. 2d 74, 89 S. Ct. 4 (1968).

[2] The uses included detection and prevention of forest fires, treatment of insect and disease infested forest areas, enforcement of game and fish laws, construction and maintenance of state roads and highways, and use in other governmental activities set out in the record below.

None of the aircraft were used for the benefit of any private person or the private benefit of any State official, and no income was derived by the State of Georgia from the use of the aircraft nor from the functions of the State in performance of which the uses occurred.

The State of Georgia argued below, and the lower court agreed, that under the doctrine of intergovernmental immunity the tax is unconstitutional as applied to the State's aircraft in this case. Thus, the question on appeal before this Court is whether the imposition by the federal government of a tax on the use of civil aircraft owned and operated exclusively by a state in the performance of traditional and essential governmental activities violates the doctrine of intergovernmental immunity under our governmental system of dual sovereigns.

This appeal is appropriately before the Supreme Court pursuant to the direct appeal provisions of 28 U.S.C. § 1252 (1970), and the United States appropriately acquiesced in the granting of certiorari in Commonwealth of Massachusetts v. United States, October Term 1976, No. 76-1500[3] in light of the United States' appeal in the instant case involving the identical issue. The decisions

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[3] See Memorandum for the United States, Case No. 76-1500, pp. 7-8.

of the lower courts in these two cases[4/] are the only two decisions involving 26 U.S.C. § 4491, and it is believed that the conflict between the two decisions is appropriate for resolution by this Court.

As will hereinafter be shown, the decision by the United States District Court for the Northern District of Georgia is a well reasoned opinion resting upon prior decisions of this Court, and as such may be affirmed on motion of the appellee. See Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952); Congress of Industrial Organizations v. McAdory, 325 U.S. 472, 477 (1945). However, should the Court deem full briefing and argument necessary or appropriate in light of the substantial impact of a decision in this case upon the states, as well as upon the taxing power of the federal government, then Appellee would respectfully request the Court to set the case down for oral argument in tandem with Case No. 76-1500.

4/ See the unreported Order of the United States District Court for the Northern District of Georgia, December 30, 1976, reprinted at p. 1a of the Appendix to the Jurisdictional Statement in the instant case; opinion of the United States Court of Appeals for the First Circuit, reported at 548 F.2d 33.

ARGUMENT

A. THE DECISION OF THE LOWER COURT WAS CORRECT UNDER THE PRIOR DECISIONS OF THIS COURT

Since the landmark case of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), this Court has recognized that the power to tax involves the power to destroy, and thus that there are limits to the exercise of the power of taxation by both the federal and state governments, so as to prevent one from destroying the other. 17 U.S. at 431, 433.

The doctrine of intergovernmental immunity has evolved since McCulloch v. Maryland, and even though it has undergone some apparent judicial retreats it remains today a vital judicial doctrine safeguarding the American governmental system of dual sovereigns. It is not an exaggeration to state that without the doctrine and the proper judicial application thereof the federal government could not only intrude into areas of essential governmental activities by the states, but could in fact totally usurp their discretionary authority in any number of areas; and the usurpation could be accomplished under the guise of carrying out otherwise appropriate activities or effectuating seemingly beneficial purposes.

This Court, however, has never refrained, when properly presented with the issue, from

analyzing the true effect of a federal tax burden upon state governmental operations, with a view toward protecting the sovereignty of the states which was intended under our constitutional system of government.

Thus, in the case of Indian Motorcycle Co. v. United States, 283 U.S. 570 (1931), the Court held that the sale of a motorcycle to a municipality for use in its police service was not constitutionally subject to a federal excise tax on the sale, even though the tax was imposed on the seller. The Court found that the maintenance of a police service by a state agency was a governmental function immune from federal taxation and that the tax was not so indirect or remote as to remove it from the principle of immunity. 283 U.S. at 579.

The analogy of the Indian Motorcycle case to the instant case is a close one, because some of the aircraft used by the State of Georgia are actually used for law enforcement activities.

In discussing the doctrine of intergovernmental immunity the Court stated:

> "Where the principle [of immunity] applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute. McCulloch v. Maryland, ..." 283 U.S. at 575.

Thus, when the federal government interferes through taxation with sovereign activities of the states, it makes no difference how small or great is the interference with the states' operations; if the very activities themselves are immune, the tax may not be applied at all to the state.

Another important case is the much discussed decision of New York v. United States, 326 U.S. 572 (1946), which also supports the decision of the lower court in the instant case. In New York v. United States the Court upheld a federal tax on the sale of mineral water by New York but split on what the proper test for application of the doctrine of intergovernmental immunity should be.

Though the Court upheld the tax, even the judgment opinion recognized that state use of state owned property which is uniquely of use to the state is entitled to immunity from federal taxation. 326 U.S. at 582. In the instant case the civil aircraft owned and operated exclusively by the state for essential governmental functions are uniquely state property constituting a class by themselves and thus entitled to immunity from federal taxation under the reasoning of the judgment opinion.

Similarly, the approach presented in the concurring opinion of Chief Justice Stone in New York v. United States,

indicating that the key to invalidity is undue interference with the state's performance of sovereign functions, 326 U.S. at 588, weighs in favor of the state in the instant case because the tax is a direct tax upon the exclusive means employed by the state in performing essential governmental functions.

It is particularly clear that the decision of the lower court was correct under the decisions of this Court when the Indian Motorcycle case and the case of New York v. United States are read in conjunction with the recent case of National League of Cities v. Usery, 426 U.S. 833 (1976).5/

5/Appellee by no means intends to oversimplify the complexity of the proper analysis and application of the doctrine of intergovernmental immunity by such a brief discussion of each of these cases or by omitting to discuss other relevant cases; however, Appellee feels a detailed treatment of the cases would be more appropriate in a brief on the merits should the Court reserve ruling until after full briefing and argument.

B. THE CASE OF NATIONAL LEAGUE OF CITIES V. USERY MAKES IT CLEAR THAT IT IS DIRECTNESS OF INTERFERENCE WITH GOVERNMENTAL FUNCTIONS THAT DETERMINES THE VALIDITY OF A FEDERAL TAX UPON STATE ACTIVITIES

In the case of National League of Cities v. Usery, 426 U.S. 833 (1976), it was held that the minimum wage and maximum hour standards of the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. (1940), were an invalid exercise of the federal commerce power insofar as they operated to directly displace the states' freedom and ability to structure integral operations in areas of traditional governmental functions.

The Usery case is significant for at least two reasons. First, it establishes, after a long silence by the Court in the area, that the doctrine of intergovernmental immunity not only still has vitality but that it remains a critical judicial tool for the protection of our constitutional form of government. Second, the case establishes the proper approach under the doctrine for determining the validity of a federal statute which encroaches upon areas of state activity.

In Usery the Court stated:

"This Court has never doubted that

> there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce . . . ." 426 U.S. at 842.

Then, after reviewing its prior decisions, including New York v. United States, supra, the Court in effect established a two pronged test for measuring the validity of a federal statute similar to the one in the instant case. First, the nature of the state activity or function is to be analyzed. If the state function is not a traditional, governmental function it is not entitled to freedom from federal interference. If, as in the instant case, the state activity is one traditionally left to the states in the exercise of their governmental sovereignty, then the next step is to measure the directness of federal interference in that area of activity. Where the action by the federal government directly interferes with the state activity, the federal interference is prohibited--due to a lack of power by the federal government to intrude in such a way.

As the Court stated, federal action applied to the states is invalid when it:

> "displaces state policies regarding the manner in which they will structure delivery of those governmental services which their

> citizens require." 426 U.S. at 847.

And thus the Court stated its own holding as being that federal statutes which:

> "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, . . . are not within the authority granted Congress [by the constitution]." 426 U.S. at 852.

The federal excise tax on civil aircraft is invalid in the instant case because it is directly imposed upon the State of Georgia, and it directly interferes with the State of Georgia's freedom to select the method of providing and the means of performing essential and traditional governmental functions.

The record below establishes that the State of Georgia selected the aircraft involved in this case and the particular uses of the aircraft to which they were actually put as the means of accomplishing the governmental functions performed by the various State departments through the use of the aircraft. The federal tax was imposed upon State activities and policy decisions which were already in existence, and the tax has a direct burden upon the budget and appropriations of the State, since the aircraft were purchased with

appropriated State funds and the taxes were paid with appropriated State funds.

In addition, the tax was imposed upon the entire fleet of aircraft of the State of Georgia, so that not only was the taxation a direct interference, but it was also a substantial interference. Just as this Court recognized in the Usery case, if the tax on the use of civil aircraft be upheld, the only alternatives available to the State of Georgia would be to appropriate additional funds from its treasury for the payment of these taxes or to reduce its complement of airplanes. See 426 U.S. at 848. Such direct displacement of State choices as to how to administer its public laws and perform necessary public services, when directly upon the State and the State treasury and upon traditional governmental activities and property used exclusively in performing traditional governmental functions, is clearly an impermissible federal interference. See National League of Cities v. Usery, supra at 851-52.

Therefore, under the Usery case, the New York v. United States case, the Indian Motorcycle Co. case and the other prior decisions of this Court, the lower court was correct in entering judgment in favor of the State of Georgia, and its decision should be affirmed. The arguments to the contrary by the United States are without merit.

C. THE ARGUMENT THAT THE TAX IS CONSTITUTIONAL BECAUSE IT HAS BEEN CHARACTERIZED AS A "USER FEE" IS TOTALLY WITHOUT MERIT

By arguing that the tax assessed against the State of Georgia in this case, which was assessed and collected by the Internal Revenue Service, is not a tax but a "user fee", the United States begs the question in issue. The question is not what the levy may properly be labeled, but whether this particular interference by the federal government into admitted areas of traditional governmental functions is permissible under our system of government. Regardless of what it is called, it is not permissible. See National League of Cities v. Usery, supra.

Further, contrary to the arguments of the United States, the levy on the use of civil aircraft is as a matter of law a tax anyway. The nature of a tax is determined by its operation rather than by descriptive language applied to it, Educational Film Corp. v. Ward, 282 U.S. 379, 387 (1931), and thus this Court has recognized that a levy on gasoline is a tax and not a toll or charge for use of the highways, Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U.S. 249, 268 (1933). And the taxing power is not related to and does not depend upon the enjoyment by the taxpayer of any special

benefit from the use of the funds raised by the tax. Id.

Therefore, the principle of immunity applies and invalidates the levy on Georgia's civil aircraft.

CONCLUSION

Since the decision of the lower court in this case was both correct and required under the prior decisions of this Court, Appellee would respectfully urge the Court to grant its motion to affirm. However, should the Court deem further briefing and argument necessary or helpful, Appellee would request the Court to set oral argument in this case in tandem with the Massachusetts case. While the issues in the two cases are identical, nevertheless, there are important factual distinctions in the two cases which the State of Georgia feels would be highly significant in the rendering of a final decision in this matter by the Court. Thus, in order to have the two cases argued in tandem, the State of Georgia is willing, if the Court should deem it necessary, to waive the full time authorized under the rules for the filing of a brief on the merits and to proceed under a modified briefing schedule so that the Court might have before it all factors relevant to the

very important issue involved in these cases prior to a final decision on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David A. Runnion, one of the attorneys for Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served Appellant with three copies of the foregoing Motion to Affirm or to Specially Set Argument by depositing same in the United States mail, with first class postage prepaid, addressed to counsel for Appellant, to wit:

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

I have also served a copy upon counsel for the Commonwealth of Massachusetts in Case No. 76-1500.

This _____ day of _____, 1977.

_____
DAVID A. RUNNION
Assistant Attorney General